(1)

FILED

97 1069 DEC 23 1997

OFFICE OF THE CLERK

No.

In The
Supreme Court of The United States
October Term 1997

JOHN H. HAPGOOD,

Petitioner,

v.

CITY OF WARREN,

Respondent.

Petition For A Writ of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI
with Appendix

*MARK S. COLUCCI, ESQ. (0023683)
ATTORNEY AT LAW
1101 Bank One
6 Federal Plaza West
Youngstown, OH 44503
(330) 746-3535

Attorney for Petitioner
*Counsel of Record

LEGAL ADVANTAGE * 432 Walnut Street * Cincinnati, OH 45202

44 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether an employee's right to bring suit in a Federal Court pursuant to the Americans with Disabilities Act (ADA) is pre-empted by the Federal Labor Management Relations Act, to wit; can a employee file suit in Federal Court pursuant to an ADA claim in spite of a prior adverse binding arbitration decision which did not address the ADA claim and when the arbitrator, pursuant to the relevant collective bargaining agreement did not and could not consider a grievance based upon an ADA claim?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Sixth Circuit.

TABLE OF CONTENTS

Questions Presented for Review i

List of Parties to the Proceeding
in the Court Below ii

Table of Authorities iv

Opinions Below 2

Statement of Jurisdiction 2

Constitutional Provisions, Treaties,
Statutes, Rules and Regulations Involved 2

Statement of the Case 3

Reasons for Granting Writ 4

Conclusion 8

Appendix:

Opinion and Judgment Entry,
United States Court of Appeals
for the Sixth Circuit . . . . . Apdx. A1-13

Opinion and Judgment Entry,
United States District Court
for the Northern District of Ohio ..... Apdx. B14-17

42 U.S.C. 12101 ..... Apdx. C18-21

42 U.S.C. 12112 ..... Apdx. D22-29

TABLE OF AUTHORITIES

Cases

Alexander vs. Gardner-Denver Co.,
415 U.S. 36 (1974) 7

EEOC vs. Board of Governors of State Colleges and Univs., 957 F. 2d 424, 431, (7th Cir.), cert. denied 506 U.S. 906 (1992) 7, 8

Pryner vs. Tractor Supply Co., Inc.,
927 F. Supp. 1140 S.D. Ind. 1996) 4, 6

Pryner vs. Tractor Supply Co., Inc.,
109 F. 3d. 354 (7th Cir. 1997),
cert. denied (opinion pending) 4, 6, 7

STATUTES

42 U.S.C. 12101 . . . . . 2, 4, Apdx. C

42 U.S.C. 12112 . . . . . 2, 4, Apdx. D

NO.:

In the Supreme Court of the United States
October Term, 1997

JOHN H. HAPGOOD,
Petitioner,

vs.

CITY OF WARREN,
Respondent.

Appeal to United State Court of Appeals for the Sixth Circuit from the United States District Court for the Northern District of Ohio

---

PETITION FOR WRIT OF CERTIORARI

John H. Hapgood, the petitioner herein respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on September 25, 1997.

OPINIONS BELOW

The September 25, 1997 decision of the United States Court of Appeals for the Sixth Circuit, whose judgment herein is herein sought to be reviewed, was Case No.: 96-3917 decided on September 25, 1997 and is unreported, and is reprinted in the separate Appendix to this Petition, **App. A**. The prior opinion of the United States District Court for the Northern District of Ohio, entered on July 18, 1996, was Case No.: 4:95CV02090 decided on July 18, 1996, and is unreported, and is reprinted in the separate Appendix to this Petition, **App. B**.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on September 25, 1997. The jurisdiction of this Court is involved pursuant to 28 U.S.C. 1257.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

This case involves Americans with Disabilities Act ("ADA"), 42 U.S.C. Sections 12101 and 12112.

STATEMENT OF THE CASE

Petitioner, John Hapgood was employed as a firefighter for the City of Warren in Trumbull County, Ohio, from March 30, 1992 until his discharge on December 7, 1993. During 1993, Petitioner filed and pursued a workers compensation claim arising from his employment with the City of Warren. Petitioner also filed the herein claim pursuant to the Americans with Disabilities Act, with the U.S. District Court for the Northern District of Ohio, Eastern Division.

The Respondent, City of Warren, moved for Summary Judgment based upon the doctrine of collateral estoppel as it pertained to Petitioner's related discharge proceeding before an arbitrator.

The Court granted Summary Judgment in favor of the Respondent, without hearing, based upon the doctrine of collateral estoppel.

REASONS FOR GRANTING THE WRIT CERTIORARI SHOULD BE GRANTED BECAUSE THE UNITED STATES COURT OF APPEALS, SIXTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE DECISION OF THE UNITED STATES SUPREME COURT, WHICH DENIED CERTIORARI IN PRYNER VS. TRACTOR SUPPLY CO., INC., 927 F. Supp. 1140 (S.D. Ind. 1996), and 109 F. 3d. 354 (7th Cir. 1997).

The issue in this case is whether an employee who uses a grievance procedure as outlined in a collective bargaining agreement is then barred from filing a claim in Federal Court pursuant to the Americans with Disabilities Act, (ADA), to wit; 42 U.S.C. Section 12101 and 42 U.S.C. Section 12112.

In October of this year, the United States Supreme Court denied certiorari in the matter entitled **Pryner vs. Tractor Supply Co., Inc**. 927 F. Supp. 1140 (S.D. Ind. 1996).

The United States District Court for the Southern District of Indiana, ruled that a:

[G]rievance procedure in collective

bargaining agreement was intended to vindicate employee's contractual rights, while Title VII and ADA created independent statutory right to be free from discrimination, distinctly separate nature of these contractual and statutory rights is not vitiated merely because both may have been violated as result of same factual occurrence, and no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums.... [T]his recognizes one of the classic differences between an individual employment contract between an employee and his or her employer and the contract created by a collective-bargaining agreement. While an individual may surrender any of his or her statutory rights unless Congress has expressed the intent that a particular right cannot be surrendered, in the context of a collective-bargaining agreement, the rights at issue are solely those articulated within the confines of the agreement itself. In other words, while an individual employment contract can address both contractual and statutory rights, a collective-bargaining agreement, by its very nature, may only

> address the contractual rights of the members of the bargaining unit. "Thus the arbitrator has authority to resolve only questions of contractual rights, and this authority remains regardless of whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by Title VII," .... [T]he Court's recognition of the dualism between the contractual rights governed by a collective-bargaining agreement and the statutory rights which flow to each individual within the collective bargaining unit is unchanged....

Id.

The U.S. Court of Appeals for the Seventh Circuit hold in **Pryner vs. Tractor Supply Co**., 109 F. 3d 354 (7th Cir. 1997), that a worker's statutory rights are arbitrable only if the worker consents to have them arbitrated; a union may not consent for a worker by signing a collective bargaining agreement that consigns the enforcement of statutory rights to a union controlled grievance and arbitration machinery created by said agreement. The U.S. Supreme Court denied certiorari on this case on October 15, 1997. Thus, the Sixth Circuit of both the U.S. Supreme Court and the Seventh Circuit in **Pryner**.

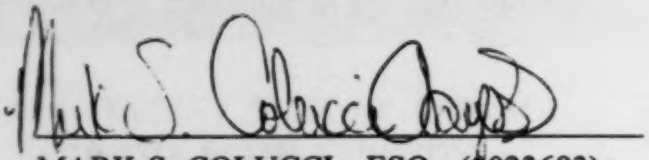
> [W]e are not holding the workers' statutory rights are never arbitrable. They are arbitrable if the worker consents to have them arbitrated. If the worker brings suit, the employer suggests that their dispute be arbitrated, the worker agrees, and the collective bargaining agreement does not preclude such side agreements, there is nothing to prevent a binding arbitration.... [A]ll we are holding is that the union cannot consent for the employee by signing a collective bargaining agreement that consigns the enforcement of statutory rights to the union controlled grievance and arbitration machinery created by the agreement.

In addition, this Court also held in **Alexander vs. Gardner-Denver Co.,** 415 U.S. 36 (1974) that arbitration of a contractual right not to be discriminated against does not preclude enforcement of a statutory right.

The Seventh Circuit also held **in EEOC vs. Board of Governors of State Colleges and Univs.**, 957 F. 2d 424, 431, (7th Cir.), cert. denied 506 U.S. 906 (1992), that "it is well established that unions cannot waive employees' ADEA or Title VII rights through collective bargaining."

CONCLUSION

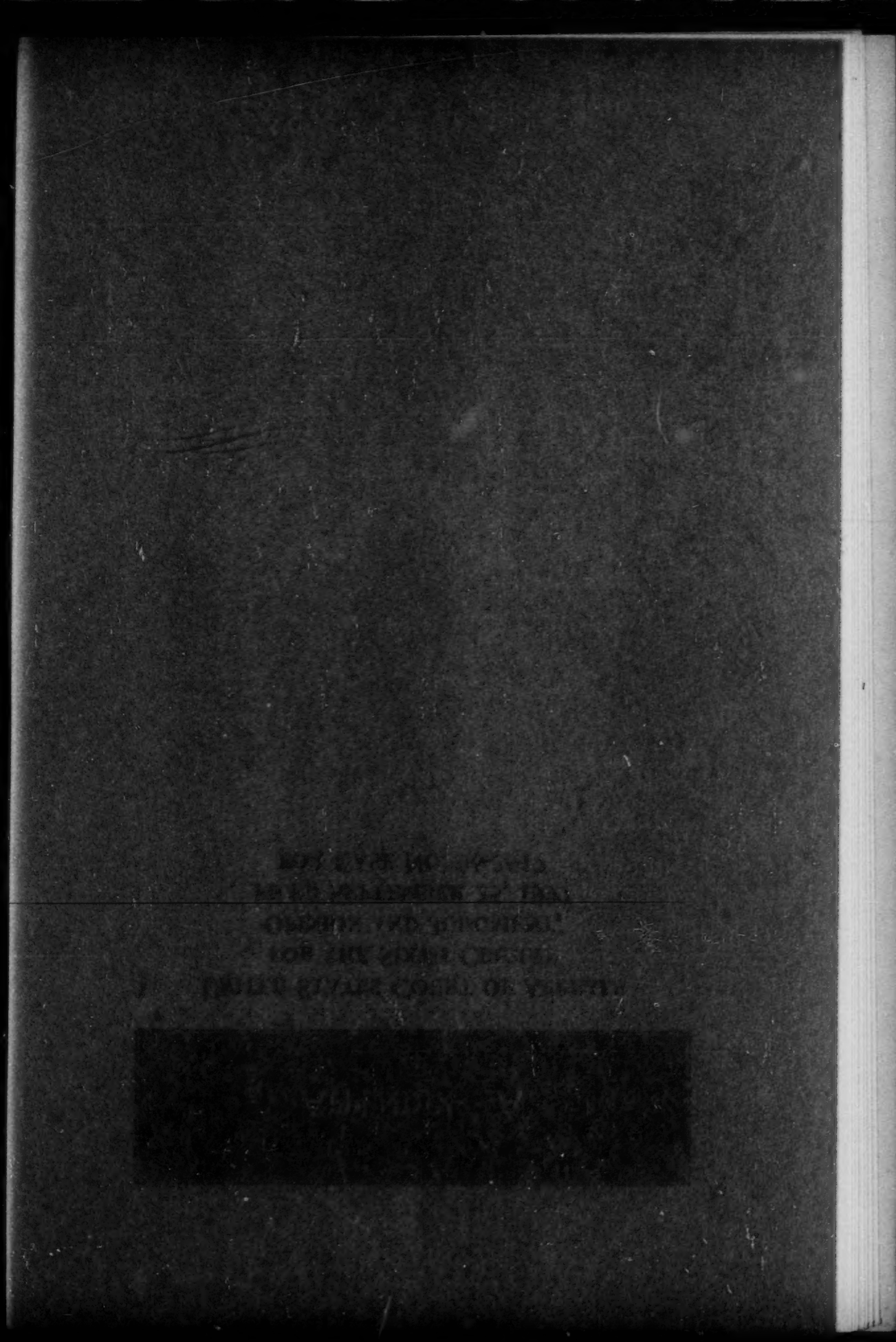
WHEREFORE, for the foregoing reasons, petitioner respectfully prays that his petition for a writ of certiorari be granted.



MARK S. COLUCCI, ESQ., (0023683)
Counsel of Record for Petitioner
1101 Bank One
6 Federal Plaza West
Youngstown, Ohio 44503
(330) 746-3535

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
OPINION AND JUDGMENT,
FILED SEPTEMBER 25, 1997
FOR CASE NO. 96-3917



RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1997 FED App. 0286P (6th Cir.)
File Name: 97a0286p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN H. HAPGOOD,

Plaintiff-Appellant,

v.

CITY OF WARREN,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Ohio at Youngstown.
No. 95-02090--Peter C. Economus, District Judge.

Argued: July 30, 1997
Decided and Filed: September 25, 1997

Before: **NORRIS, BATCHELDER,** and **DAUGHTREY,** Circuit Judges.

COUNSEL

ARGUED: Mark S. Colucci, Youngstown, Ohio, for Appellant. James E. Sanders, CITY OF WARREN DEPARTMENT OF LAW, Warren, Ohio, for Appellee. **ON BRIEF:** Mark S. Colucci, Youngstown, Ohio, for Appellant. James E. Sanders, CITY OF WARREN DEPARTMENT OF LAW, Warren, Ohio, for Appellee.

OPINION

ALICE M. BATCHELDER, Circuit Judge. Plaintiff John Hapgood appeals from the order of the district court granting summary judgement in favor of defendant City of Warren on plaintiff's Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-21[illegible], claim. For the following reasons, we **AFFIRM.**

I. BACKGROUND

Defendant hired plaintiff as a firefighter on March 30, 1992. In January 1993, plaintiff began experiencing lower back pain. He therefore made an appointment with Dr. Patrick Ensmiger, a chiropractor. Plaintiff told Dr. Ensmiger that the pain began insidiously and that it flared up when he ran, jogged, or sat in an "easy chair." Dr. Ensmiger examined plaintiff and determined that plaintiff suffered from lumbar facet syndrome and lumbar radiculitis.

Plaintiff sought a second opinion from Dr. Robert J.

Brocker, M.D., who, after conducting multiple examinations, diagnosed plaintiff with a hereditary degenerative spondylotic disc disease. Dr. Brocker recommended that plaintiff undergo surgery to alleviate the pain and plaintiff agreed.

Subsequently, plaintiff submitted a claim for medical coverage with his insurance company, Community Mutual. In return, Community Mutual sent plaintiff a questionnaire inquiring whether plaintiff's claim was work related. Plaintiff responded that his back problem did not result from a work-related accident, injury, or illness, and that he had not filed a workers' compensation claim.

Plaintiff returned to work on June 4, 1993, and was assigned to light-duty until August 31. Plaintiff never filed an injury report with the fire department. On September 15, plaintiff's back pain returned. Dr. Brocker therefore prepared a written recommendation that plaintiff be placed on light-duty for a second time. Plaintiff, however, did not submit this recommendation to the fire department until September 27.

On September 30, Chief Kent Fusselman, one of plaintiff's supervisors, questioned plaintiff about his light-duty status. Fusselman wanted to know why plaintiff waited until September 27 to submit a light-duty form when he received Dr. Brocker's recommendation on September 15.

Fusselman also expressed concern regarding plaintiff's recuperative potential and his ability to return to full-duty status without restrictions. The fire department subsequently verbally reprimanded plaintiff for withholding his light-duty recommendation.

On October 15, plaintiff submitted a claim for workers' compensation benefits, asserting that his back injury was work-related. Because plaintiff had indicated otherwise in his letter to Community Mutual, the claim was "red flagged." The fire department held a hearing on the charge that plaintiff falsified records when he submitted his workers' compensation claim, which resulted in plaintiff's discharge on December 7.

On December 16, plaintiff filed a complaint against defendant in Ohio state court, alleging that defendant discharged him in retaliation for filing a workers' compensation claim. Additionally, plaintiff alleged that defendant's conduct was "tortious, unlawful and contrary to public policy."

Plaintiff also filed a grievance under his union's collective bargaining agreement, arguing that he was discharged without "just cause." The matter proceeded to binding arbitration on May 12, 1994. After conducting a hearing, the arbitrator overruled plaintiff's grievance and found that plaintiff had falsified his workers' compensation

application. Plaintiff was therefore fired for cause.

On February 28, 1994, plaintiff filed a complaint with the Ohio Civil Rights Commission ("OCRC"). Plaintiff claimed that defendant discharged him because of his alleged disability—back pain. More specifically, plaintiff alleged that defendant threatened to revoke his light-duty status and terminate him if he did not withdraw his workers' compensation claim. On December 15, the commission dismissed plaintiff's complaint and stated that the evidence established that defendant discharged plaintiff for "falsification of records and gross neglect of duty in the filing of a Worker's Compensation claim." Plaintiff sought reconsideration, but the OCRC refused his request. The OCRC therefore forwarded plaintiff's complaint to the Equal Employment Opportunity Commission ("EEOC"), which, on June 29, 1995, ruled that there was insufficient evidence to establish an ADA violation.

While all of these administrative proceedings were taking place, defendant moved for summary judgment in the action pending before the Ohio state court.[1] The court granted this motion on October 13, 1995. Plaintiff appealed and the Ohio Court of Appeals affirmed the trial court's order on

---

[1]The record does not indicate the date on which defendant filed this motion. However, at oral argument counsel for defendant stated that the motion was filed on June 23, 1995. Plaintiff did not contest this assertion.

October 25, 1996.

On September 28, 1995, plaintiff filed the present action in federal district court. Plaintiff alleged that defendant violated the ADA by failing to provide a reasonable accommodation for his alleged disability. Defendant moved for summary judgment, arguing that plaintiff's suit was barred by the doctrine of res judicata. The district court agreed and granted defendant's motion. Plaintiff timely appealed.

II. DISCUSSION

We review *de novo* a district court's grant of summary judgment. *Moore v. Holbrook*, 2 F.3d 697, 698 (6th Cir. 1993). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c).

The sole issue presented by this appeal is whether plaintiff's ADA claim is barred by the claim preclusion prong of res judicata.[2] We hold that it is.

---

[2]The doctrine of res judicata includes two separate concepts: claim preclusion and issue preclusion. *Balboa Ins. Co. v. S.S.D. Distribution Sys., Inc.*, 672 N.E.2d 718, 720 (Ohio Ct. App.), *appeal denied*, 669 N.E.2d 859 (Ohio 1996).

"Federal courts must give the same effect to a state court judgment that would be given by a court of the state in which the judgment was rendered." *Hospital Underwriting Group, Inc. v. Summit Health Ltd.*, 63 F.3d 486, 494 (6th Cir. 1995) (citations omitted); *see also* 28 U.S.C. § 1738. Therefore, when asked to give preclusive effect to a prior state court judgment, a federal court must look to the law of the rendering state to determine whether and to what extent that prior judgment should receive preclusive effect in a federal action. *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984). Consequently, we look to Ohio law to determine the preclusive effect of the prior state court judgment against plaintiff. *See City of Canton, Ohio v. Maynard*, 766 F.2d 236, 237-38 (6th Cir. 1985).

In *Grava v. Parkman Township*, 653 N.E.2d 226, 229 (Ohio 1995), the Ohio Supreme Court held that "[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." The court explained:

> When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . . , the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of

which the action arose.

Id. (alteration in original) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (1982)). Therefore, claim preclusion has four elements in Ohio: (1) a prior final, valid decision on the merits by a court of competent jurisdiction; (2) a second action involving the same parties, or their privies, as the first; (3) a second action raising claims that were or could have been litigated in the first action; and (4) a second action arising out of the transaction or occurrence that was the subject matter of the previous action. *Felder v. Community Mut. Ins. Co.*, No. 96-3320, 1997 WL 160373, at **3-4 (6th Cir. April 4, 1997) (unpublished).

All of the elements of claim preclusion are present in the instant case. First, when the Ohio court granted defendant summary judgment in plaintiff's initial lawsuit, that court rendered a valid, final judgment on the merits of plaintiff's claims.[3] *See, e.g., A-1 Nursing Care of Cleveland, Inc. v. Florence Nightingale Nursing, Inc.*, 647 N.E.2d 222, 224 (Ohio Ct. App. 1994) (stating that the grant of summary

---

[3]It is worth noting that when the district court granted defendant summary judgment, plaintiff's case in Ohio state court was on appeal. The pendency of an appeal, however, does not prohibit application of claim preclusion. The prior state court judgment remains "final" for preclusion purposes, unless or until overturned by the appellate court. *See, e.g., Cully v. Lutheran Med. Ctr.*, 523 N.E.2d 531, 532 (Ohio Ct. App. 1987) (collecting cases).

judgment terminates a party's action on the merits). Second, this lawsuit involves exactly the same parties as plaintiff's prior action in Ohio state court. Third, plaintiff could have brought this claim in his previous lawsuit against defendant. State courts have concurrent jurisdiction over ADA claims. *Lillback v. Metropolitan Life Ins. Co.*, 640 N.E.2d 250, 258 (Ohio Ct. App. 1994) (stating that Ohio courts have concurrent jurisdiction over ADA claims) (citation omitted); *see also Krouse v. American Sterilizer Co.*, 872 F. Supp. 203, 205 (W.D. Pa. 1994); *Jones v. Illinois Cent. R.R. Co.*, 859 F. Supp. 1144, 1145 (N.D. Ill. 1994). Therefore, once plaintiff received his right to sue letter from the EEOC, he could and should have attempted to amend his complaint in state court to include this ADA claim. The Ohio courts have allowed such amendment even after dispositive motions have been filed, especially when the failure to amend would have potential preclusionary effect. *See Brannan v. Fowler*, 654 N.E.2d 434, 437 (Ohio Ct. App. 1995) (stating that trial court abused its discretion in failing to allow plaintiff to amend his complaint after defendant filed motion for summary judgment because failure to amend could lead to future defense of res judicata).

This leaves the last element of claim preclusion—whether plaintiff's ADA claim arose out of the same transaction or occurrence that was the subject matter of plaintiff's prior lawsuit against defendant in Ohio state court. The Ohio

Supreme Court has defined "transaction" as a "common nucleus of operative facts." *Grava v. Parkman Township*, 653 N.E.2d at 229 (citation omitted). The court explained:

> That a number of different legal theories casting liability on an actor may apply to a given episode does not create multiple transactions and hence multiple claims. This remains true although the several legal theories depend on different shadings of the facts, or would emphasize different elements of the facts, or would call for different measures of liability or different kinds of relief.

Id. (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. c (1982)). It is irrelevant that the plaintiff, in the second action, is prepared to present evidence or theories of the case not offered in the first action, or that the plaintiff seeks remedies not previously demanded. *Id.* (citation omitted).

Plaintiff's ADA claim arises out of the same common nucleus of operative facts at issue in his first lawsuit. This action, like the first, centers around plaintiff's back problems and his subsequent conflicts with Chief Fusselman. No other facts are at issue. Through his ADA claim, plaintiff is merely seeking to relitigate the propriety of his discharge. Indeed, plaintiff's complaint in this action explicitly states that defendant, instead of providing a reasonable accommodation for plaintiff's alleged disability,

discharged plaintiff when he filed a workers' compensation claim.

Claim preclusion "requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it." *National Amusements, Inc. v. City of Springdale*, 558 N.E.2d 1178, 1180 (Ohio 1990) (citations omitted). The district court did not err in granting defendant summary judgment on plaintiff's ADA claim.

III. CONCLUSION

We **AFFIRM** the order of the district court granting summary judgment to defendant.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Case No. 96-3917

JOHN H. HAPGOOD,

Plaintiff-Appellant,

v.

CITY OF WARREN,

Defendant-Appellee.

JUDGMENT

Filed: September 25, 1997

Before: **NORRIS, BATCHELDER,** and **DAUGHTREY,** Circuit Judges.

ON APPEAL from the United States District Court for the Northern District of Ohio at Youngstown.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court granting summary judgment ot defendant City of Warren is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/Leonard Green, Clerk

A True Copy.

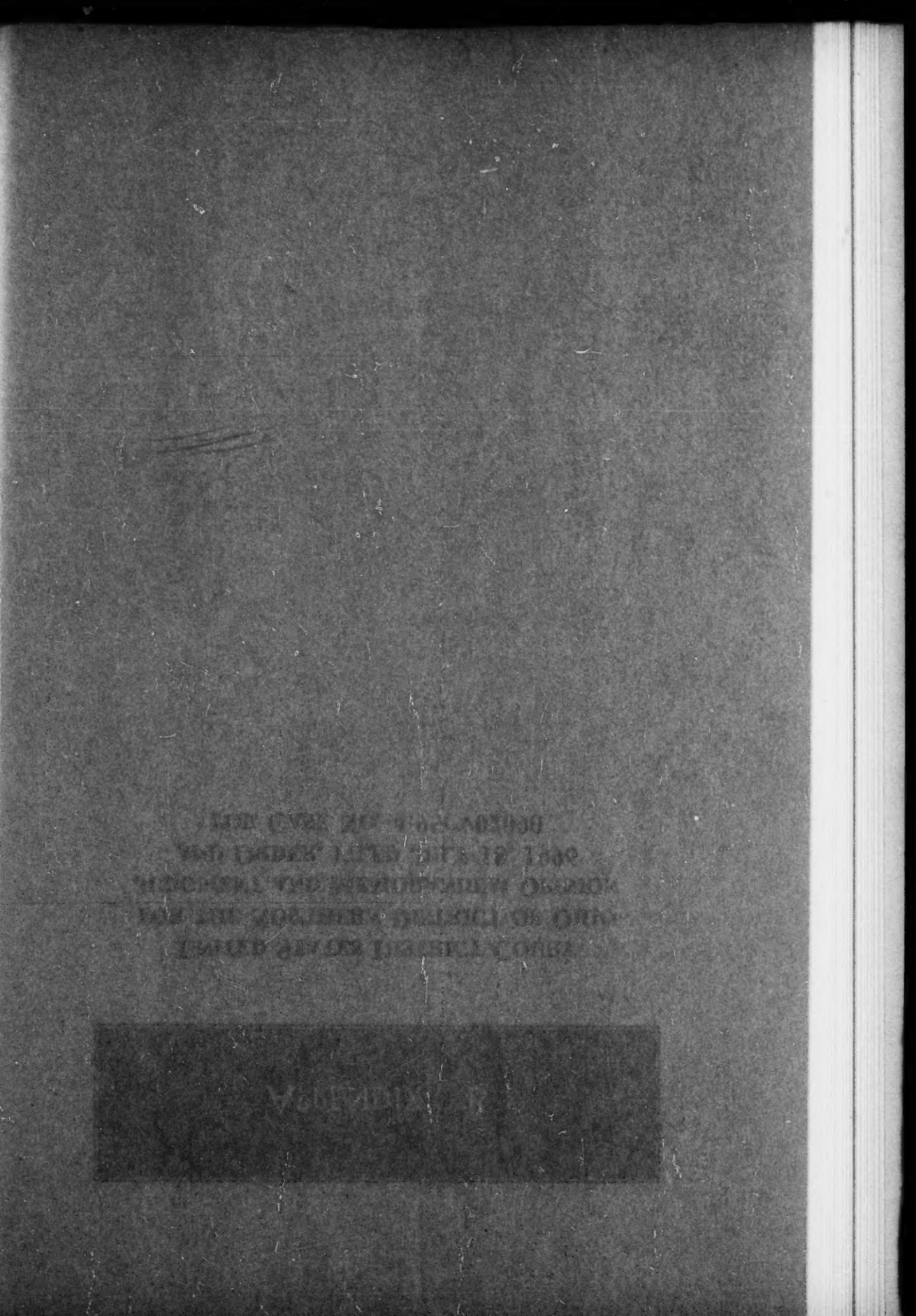
Attest:

/s/Valerie Fields

Issued as Mandate: October 20, 1997

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
JUDGMENT AND MEMORANDUM OPINION
AND ORDER, FILED JULY 18, 1996
FOR CASE NO. 4:95CV02090



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

John H. Hapgood,	)	Case No.4:95cv02090
Plaintiff,	)	
v.	)	Judge Peter C. Economus
City of Warren,	)	
Defendant.	)	Judgment

This matter is before the Court upon the motion of Defendant for Summary Judgment pursuant to Fed.R.Civ.P.56. For reasons set forth in the Memorandum Opinion and Order, Plaintiff is barred by *res judicata* from asserting his claims against City of Warren in this action.

Accordingly, **JUDGMENT** is entered in favor of Defendant.

IT IS SO ORDERED.

/s/Peter C. Economus
United States District Judge

Filed: July 18, 1996

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

John H. Hapgood,	)	Case No.4:95cv02090
Plaintiff,	)	
v.	)	Judge Peter C. Economus
City of Warren,	)	Memorandum Opinion
Defendant.	)	and Order

This matter is before the Court upon the motion of Defendant for Summary Judgment pursuant to Fed.R.Civ.P.56. Plaintiff filed this action against Defendant, City of Warren, for an alleged violation of the American's With Disabilities Act by failing to reasonably accommodate Plaintiff for his physical disability.

Plaintiff filed a grievance pursuant to the Collective Bargaining Agreement between Defendant and Plaintiff's agent, the International Association of Firefighters Local No.204, based upon the same facts that are the subject of the litigation at bar. This grievance was submitted to final and binding arbitration as set forth in the contract. The Arbitrator found that Plaintiff's discharge was with just cause, not in retaliation for his filing of the claim, and not

related to his alleged physical disability.

Plaintiff filed a discharge of discrimination with the Ohio Civil Rights Commission based upon the same facts that are subject of the litigation at bar. The Ohio Civil Rights Commission dismissed Plaintiff's discrimination charge ruling that just cause existed for the Plaintiff's discharge. Plaintiff requested reconsideration, but this request was denied.

Plaintiff filed a claim for wrongful discharge with the United States Equal Employment Opportunity Commission. The Commission found that there was not a violation of the Americans With Disabilities Act.

Also, Plaintiff filed a cause of action in the Trumbull County Court of Common Pleas, Case No.93cv1999, based upon the same facts that are the subject of the litigation at bar. The Court of Common Pleas Judge W. Wyatt McKay granted summary judgment to Defendant. Plaintiff has filed a Notice of Appeal with the Eleventh District Ohio Court of Appeals which is still pending.

"Under *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." Allen v. McCurry, 449 U.S. 90, 94(1980).

The issues in this matter are identical to those raised in his cause of action in the Trumbull County Court of Common Pleas. The granting of summary judgment to Defendant in the state action was a final judgment on the

merits. Therefore, Plaintiff is barred by *res judicata* from asserting his claims against City of Warren in this action.

Accordingly, Defendant's Motion for Summary Judgment (Dkt.#9) is **GRANTED. IT IS SO ORDERED.**

/s/Peter C. Economus
United States District Judge

Filed: July 18, 1996

APPENDIX C

U.S.C § 12101

U.S.C. § 12101. Findings and purpose

(a) Findings

The Congress finds that--

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and despite some improvements such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such

discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from

stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter--

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with

disabilities; and

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

APPENDIX D

U.S.C § 12112

U.S.C. § 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes--

(1) limiting, segregating, or classifying a job applicant of employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of

the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration--

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered

entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) Covered entities in foreign countries

(1) In general

It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of a foreign country in which such workplace is located.

(2) Control of corporation

(A) Presumption

If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) Exception

This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) Determination

For purposes of this paragraph, the determination of whether an employee controls a corporation shall be based on--

(i) the interrelation of operations;

(ii) the common management;
(iii) the centralized control of labor relations; and
(iv) the common ownership or financial control, of the employer and the corporation.

(d) Medical examinations and inquiries

(1) In general

The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

(2) Preemployment

(A) Prohibited examination or inquiry

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry

A covered entity may make

preemploymnet inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if--

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that--

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the

disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

(4) Examination and inquiry

(A) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related

functions.

(C) Requirement

Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

Supreme Court, U.S.
FILED
FEB 26 1998
CLERK

No. 97-1069

In The

Supreme Court of the United States

October Term, 1997

JOHN H. HAPGOOD,

Petitioner,

vs.

THE CITY OF WARREN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JAMES E. SANDERS
Assistant Law Director
Attorney for Respondent
391 Mahoning Avenue, N.W.
Warren, Ohio 44483
(330) 841-2605

144908

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, inc.

8 pp

TABLE OF CONTENTS

Page

Statement of the Case 1

Reasons for Denying the Writ 5

Conclusion 6

TABLE OF CITATIONS

Case Cited:

National Amusement Inc. v. City of Springdale, 558 N.E. 2d 1178 (Ohio 1990) 6

STATEMENT OF THE CASE

Petitioner, John H. Hapgood, was hired as a firefighter by Respondent, City of Warren (a municipal corporation), effective March 30, 1992. In January of 1993, Petitioner began experiencing back-related discomfort. In March of 1993, Petitioner was seen by one physician, and thereafter was seen by a second physician. As a result of these examinations, it was determined that Petitioner required back surgery. On May 13, 1993, Petitioner received a health insurance questionnaire asking whether or not the back condition in question was work-related. Petitioner responded on May 26, 1993, a few days after his surgery, that the back condition in question was not work-related.

Petitioner returned to work on June 4, 1993. Due to his physical disability he was assigned to "light duty". This "light duty" continued throughout the summer of 1993.

On September 27, 1993, Petitioner's "light duty" status was brought into question. Petitioner thereafter, on October 15, 1993, submitted an application for Workers' Compensation benefits. This claim stated that the aforementioned back problem of Petitioner was now work-related.

Following conferences and pre-disciplinary hearings, Petitioner was discharged from his employment with Respondent on December 7, 1993, for the falsification of his aforementioned Workers' Compensation claim.

After Petitioner's discharge, he filed a charge of discrimination against Respondent with the Ohio Civil Rights Commission. Within said charge Petitioner asserted that he was discharged contrary to state law in retaliation for having filed or pursued a Workers' Compensation claim against Respondent.

The Ohio Civil Rights Commission, on December 15, 1994, dismissed Petitioner's charge against Respondent, ruling that just cause existed for Petitioner's discharge. Thereafter Petitioner requested that the Ohio Civil Rights Commission reconsider its dismissal of his charge against Respondent, again asserting that he was discharged contrary to state law by Respondent in retaliation for having filed or pursued a Workers' Compensation claim. The Ohio Civil Rights Commission thereafter denied Petitioner's request for reconsideration.

At the time of Petitioner's discharge, there was in effect a collective bargaining agreement by and between Respondent and the bargaining agent for such employees as Petitioner (*i.e.*, International Association of Firefighters, Local No. 204). Said agreement was applicable to Petitioner. Said agreement expressly provided that no firefighter should be discharged except for just cause. That agreement also expressly provided that any firefighter desiring to contest the appropriateness of his discharge from employment must have that discharge reviewed through the grievance and arbitration provisions of said collective bargaining agreement. Said agreement also provided for final and binding arbitration for grievances thereunder by a neutral arbitrator.

After his discharge, Petitioner filed a grievance under the aforementioned collective bargaining agreement whereby he contested the justness of his discharge, arguing that he was not discharged for just cause. During the arbitration process, Petitioner asserted no federal claims, argued no federal claims, and raised no issue relative to the federal Labor Management Relations Act of 1947, or any other federal law. During the arbitration process, a hearing was held at which Petitioner and Respondent both had an opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses, to cross-examine witnesses, and to brief the issues in

writing. The neutral arbitrator, at the conclusion of the arbitration process, denied Petitioner's grievance, ruling that Petitioner was properly discharged for just cause.

After his discharge, Petitioner also filed an action in the Court of Common Pleas of Trumbull County, Ohio (hereinafter referred to as "the state trial court"). Within his Complaint before the state trial court, Petitioner set forth two causes of action. Petitioner alleged that his discharge resulted from "unlawful retaliation because of his pursuit of Workers' Compensation Claim", all allegedly "in violation of Ohio Revised Code Section 4123.90", and that his discharge resulted from intentionally tortuous conduct on the part of Respondent, in violation of state law.

Before the state trial court, Petitioner asserted no federal claims, argues no federal claims, and raised no issue relative to the federal Labor Management Relations Act of 1947, or any other federal law. On October 13, 1995, the state trial court granted Respondent's motion for summary judgment upon principles of collateral estoppel.

During the pendency of the aforedescribed action before the state trial court, the United States Equal Employment Opportunity Commission also examined the merits of Petitioner's discharge. That agency independently examined the record presented before the Ohio Civil Rights Commission, and the findings of the Ohio Civil Rights Commission. During the pendency of the aforedescribed action before the state trial court (*i.e.*, on June 29, 1995) the United States Equal Employment Opportunity Commission likewise found that Petitioner was discharged by Respondent for just cause.

From the aforedescribed order of the state trial court granting summary judgment in favor of Respondent, Petitioner filed a

Notice of Appeal with the Court of Appeals of the Eleventh Appellate District of Ohio (hereinafter referred to as "the state appellate court") on November 1, 1995. During this appeal process, Petitioner again argued that he was discharged by Respondent contrary to state law in retaliation for having filed or pursued a Workers' Compensation claim against Respondent. During this appeal process (as during the proceeding below in the state trial court) Petitioner asserted no federal claims, argued no federal claims, and raised no issue relative to the federal labor Management Relations Act of 1947, or any other federal law.

On October 28, 1996, the state appellate court affirmed the summary judgment rendered by the state trial court below in favor of Respondent under principles of collateral estoppel.

From the aforedescribed order of the state trial court granted Summary Judgment failure to Respondent/Petitioner filed a Notice of Appeal with the Court of Appeals of the Eleventh Appellant District of Ohio, hereinafter referred to as "State Appellate Court") on November 1, 1995. Petitioner asserted no federal claims, argued no federal claims and raised no issue relative to any federal law.

On February 28, 1996, the state appellate court affirmed its Summary Judgment rendered by the state trial court below in favor of the Respondent upon the principles of collateral estoppel.

From the aforedescribed decision of the state appellant court Petitioner filed his Notice of Appeal and Memorandum in Support of Jurisdiction of the Ohio Supreme Court on December 12, 1996. Within his Memorandum, Petitioner asserted no federal claims, raised no issue relative to any other federal law. By entry filed March 12, 1997, the Ohio Supreme Court declined

jurisdiction to hear this case. From that decision Petitioner filed a different Petition for a Writ of Certiorari with this honorable Court.

Concurrently with the state court proceedings the Petitioner filed on September 23, 1995, Case 4:95 CV 0290 in the United States District Court, Plaintiff's complaint for damages alleging violations of the American Disability Act. Therein Petitioner asserted he was terminated from his employment when he filed a Worker's Compensation Claim rather than being reasonably accommodated due to his disability. Upon Motion for Summary Judgment filed by the Respondent the City of Warren the United Stated District Court Judge granted Summary Judgment in favor of the Respondent upon the principles of Res Judicata.

From the United States District Courts decision the Petitioner filed his Notice of Appeal. Said appeal was heard by the United States Court of Appeals for the Sixth Circuit Case, No. 96-3917. Oral arguments were held on July 30, 1997 and the United States Court of Appeals affirmed the Summary Judgment rendered by the United States District Court in favor of the Respondent under the principles of collateral estoppel.

From that decision Petitioner has filed his second petition for a Writ of Certiorari before this Honorable Court.

REASONS FOR DENYING THE WRIT

The Petitioner has submitted to this Honorable Court for review the questions as to whether an employees' utilization of the union grievance procedure bars an employee's right to bring suit for a federally protected claim such as the Americans With Disability Act. However this presentment by the Petitioner is a misconstruction and misrepresentation of the lower court proceedings.

The issue which was decided by the federal trial court was that the Doctrine of Res Judicata prevents the Petitioner from subsequently and in a different forum presenting allegations of violations of a federal law with facts that arose out of the same occurrence presented in prior court proceedings.

The federal court of appeals upheld the federal trial court and stated "through his ADA claim Plaintiff is merely seeking in relitigate the propriety of his discharge". That court further stated the claim preclusion prong of Res Judicata "requires a Plaintiff to present every ground for relief in the first action, or forever be barred from asserting it" citing *National Amusement Inc. v. City of Springdale*, 558 N.E. 2d 1178, 1180 (Ohio 1990).

In the case at bar the courts below did not decide a "federal question", let alone "an important federal question", or "an important federal question" which conflicts with an applicable decision of an applicable other court. The allegations as set forth by the Petitioner in his Petition for the Writ of Certiorari are clearly based upon deficient factual and legal premises.

CONCLUSION

In light of the foregoing Respondent respectfully prays that Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

JAMES E. SANDERS
Assistant Law Director
Attorney for Respondent
391 Mahoning Avenue, N.W.
Warren, Ohio 44483
(330) 841-2605